Supreme Court, U.S.
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No. 95-191

In The

Supreme Court of the United States

October Term, 1995

O'HARE TRUCK SERVICE, INC. and JOHN A. GRATZIANNA,

Petitioners,

vs.

CITY OF NORTHLAKE, MAYOR REID PAXSON, and POLICE CHIEF SEYMOUR SAPOZNIK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Citations	ii
Opinions Below	1
Statement of Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Denying the Writ	2
I. Procedural considerations require denial of Petitioners' request for a writ of certiorari.	3
A. The Result Petitioners' Seek Requires Reversal Of *Monell*; This Is Not Raised In The Petition.	3
II. Petitioners' characterization of this case as involving freedom of association provides no basis for this Court to grant certiorari.	5
A. *Umbehr* Is An Unwarranted Extension Of First Amendment Precedent Because It Fails To Properly Balance The Governmental Interest In Efficient Operations Against The Independent Contractor's First Amendment Rights.	5
Conclusion	10

Page

TABLE OF CITATIONS

Cases Cited:

Ambrose v. Knotts, 865 F. Supp. 342 (S.D. W. Va. 1994) .. 9

Blankman v. County of Nausau, 819 F. Supp. 198, 205 (E.D. N.Y. 1993), *aff'd without opinion*, 14 F.3d 592 (2d Cir. 1993) 9

Branti v. Finkl, 445 U.S. 507 (1980) 5, 7

Downtown Auto Parts, Inc. v. City of Milwaukee, 938 F.2d 705 (7th Cir.), *cert. denied*, 502 U.S. 1005 (1991) 7, 8, 9

Elrod v. Burns, 427 U.S. 347 (1976) 5, 7

Fox & Company v. Schoemehl, 671 F.2d 303 (8th Cir. 1982) 9

Horn v. Kean, 796 F.2d 668 (3rd Cir. 1986) 8

LaFalce v. Houston, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984) 7, 8, 9

Lefkowitz v. Turley, 414 U.S. 70 (1973) 9

Lunblad v. Celeste, 874 F.2d 1097 (6th Cir. 1989), *vacated*, 882 F.2d 207, *reinstated in part*, 924 F.2d 627 (1991) (*en banc*), *cert denied*, 501 U.S. 1250 (1991) 8

Page

Monell v. New York City Department of Social Services, 436 U.S. 658 (1978) 3, 4

O'Hare Truck Service, Inc. v. City of Northlake, 47 F.3d 883 (7th Cir. 1994) 8

Oklahoma City v. Tuttle, 471 U.S. 808 (1985) 4

Pembauer v. City of Cincinnati, 475 U.S. 469 (1986) 3

Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) 5, 6, 7

Selch v. Letts, 5 F.3d 1040 (7th Cir. 1993) 6, 9

Sweeney v. Bond, 669 F.2d 542 (8th Cir.), *cert. denied sub nom. Schenberg v. Bond*, 459 U.S. 878 (1982) 8, 9

Triad Associates, Inc. v. Chicago Housing Authority, 892 F.2d 583 (7th Cir. 1989), *cert. denied*, 498 U.S. 845 (1990) 7, 8, 9

Umbehr v. McClure, 44 F.3d 876 (10th Cir. 1995), *cert. granted sub nom. Heiser v. Umbehr*, __ U.S. __, 115 S. Ct. 2616 (*cert. granted* June 29, 1995) (No. 94-1654) 2, 5, 10

Vickery v. Jones, 856 F. Supp. 1313 (S.D. Ill. 1994) 7

Wilson v. Civil Town of Clayton, Indiana, 839 F.2d 375 (7th Cir. 1988) 3

Contents

	Page
United States Constitution Cited:	
First Amendment	2, 5, 8, 9
Fifth Amendment	9
Fourteenth Amendment	2
Fourteenth Amendment § 1	2
APPENDIX	
Appendix A — Judgment of United States Court of Appeals, Seventh Circuit Dated February 10, 1995 ...	1a
Appendix B — Notice of Issuance of Mandate With Bill of Costs Dated March 13, 1995	3a

No. 95-191

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vs.

CITY OF NORTHLAKE, MAYOR REID PAXSON, AND POLICE CHIEF SEYMOUR SAPOZNIK,

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, The City of Northlake, Mayor Reid Paxson and police chief Seymour Sapoznik, respectfully request that the Court deny Petitioners' request for a writ of certiorari.

OPINIONS BELOW

Respondents do not challenge Petitioners' listing of opinions.

STATEMENT OF JURISDICTION

Respondents do not challenge Petitioners' jurisdictional statement; however, Petitioners have not paid the Bill of Costs taxed by the Seventh Circuit Court of Appeals on March 13, 1995. (*See* Mandate and Bill of Costs attached hereto and incorporated herein in Appendix 1a-5a.)

STATUTORY PROVISIONS INVOLVED

Petitioners properly include Amendment I to the Constitution of the United States within the listing of constitutional provisions at issue. However, Petitioners' improperly list Amendment XIV, § 1 to the Constitution of the United States as no Fourteenth Amendment arguments are raised in the petition for writ of certiorari.

STATEMENT OF THE CASE

Respondents do not challenge Petitioners' statement of the case, but supplement it as follows: The District Court dismissed on qualified immunity grounds Petitioners' First Amended Complaint against the individual defendants; and, also dismissed Petitioners' due process claim. Petitioners did not appeal these rulings in the Seventh Circuit Court of Appeals.

REASONS FOR DENYING THE WRIT

The petition should be denied for the procedural reasons set forth below. Moreover, the Supreme Court should simply overturn the Tenth Circuit decision in *Umbehr v. McClure*, 44 F.3d 876 (10th Cir. 1995) *cert. granted sub nom. Heiser v. Umbehr*, __ U.S. __, 115 S. Ct. 2616 (*cert. granted* June 29, 1995) (No. 94-1654), which would obviate Petitioners' argument here.

I.

PROCEDURAL CONSIDERATIONS REQUIRE DENIAL OF PETITIONERS' REQUEST FOR A WRIT OF CERTIORARI.

A. The Result Petitioners' Seek Requires Reversal Of *Monell;* This Is Not Raised In The Petition.

The individual defendants in this case were dismissed under the doctrine of qualified immunity and Petitioners do not contest this dismissal. Petitioners did not appeal this issue in the Seventh Circuit and have waived it here.

Petitioners now ask this Court to recognize a claim that would make Northlake responsible to pay Petitioners' damages, based on the actions of dismissed individuals. However, Petitioners also claim these individuals *violated* Northlake's official policy with respect to its list of towing operators.

Page four of the petition for writ of certiorari states that, "[I]t has been Northlake's policy and practice that companies on the rotation list will not be removed from the list without cause. Several mayors of Northlake, including Respondent Paxson and Paxson's predecessor, confirmed this policy and stated that O'Hare would remain on the rotation list so long as its quality of services was maintained."

This Court has stated that a municipality may only be liable for "acts which the municipality has officially sanctioned or ordered." *Pembauer v. City of Cincinnati*, 475 U.S. 469 (1986). Therefore, municipal liability can "never be premised on the result of a random and unauthorized act." *Wilson v. Civil Town of Clayton, Indiana*, 839 F.2d 375, 379 (7th Cir. 1988). Nowhere do Petitioners allege evidence of, or even argue, that the actions

complained of against the individual defendants were the result of a new or changed city towing policy. Moreover, there are no allegations or argument that either the mayor or police chief had the *power and authority* to so change city policy. Petitioners' position is quite simply that the individual defendants *violated* city policy and Petitioners now seek to hold the municipality liable for this violation.

In effect, Petitioners are asking this Court to establish *respondeat superior* liability against the City of Northlake. Such a result would require overturning this Court's landmark decision, *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), which establishes that municipalities are not subject to *respondeat superior* liability in Section 1983 cases. Even though Petitioners seek this result, Petitioners never address this issue and their failure to raise it or give this Court any reason to consider it requires denial of the petition for writ of certiorari.

As indicated in *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), the "decision to grant certiorari represents a commitment of scarce judicial resources with a view to deciding the merits of one or more of the questions *presented in the petition.*" 471 U.S. at 816 (emphasis added). Petitioners did not raise the *Monell* issue at any point in this litigation and most specifically, did not raise it in their petition. Petitioners have waived this issue, consideration of which is essential to the relief sought. The Court cannot grant Petitioners the relief requested without considering and overturning *Monell*. Therefore, the petition is defective and must be denied.

II.

PETITIONERS' CHARACTERIZATION OF THIS CASE AS INVOLVING FREEDOM OF ASSOCIATION PROVIDES NO BASIS FOR THIS COURT TO GRANT CERTIORARI.

Petitioners describe this case as involving freedom of *association* as a reason it should be accepted for consideration together with *Umbehr v. McClure*, 44 F.3d 876 (10th Cir. 1995) *cert. granted sub nom., Helser v. Umbehr*, __ U.S. __, 115 S. Ct. 2616 (*cert. granted* June 29, 1995) (No. 94-1654), currently pending before this Court. However, it is clear that *Umbehr* is an unwarranted extension of First Amendment precedent; this Court should simply overturn *Umbehr* and deny Petitioners' request for a writ of certiorari.

A. *Umbehr* Is An Unwarranted Extension Of First Amendment Precedent Because It Fails To Properly Balance The Governmental Interest In Efficient Operations Against The Independent Contractor's First Amendment Rights.

The Supreme Court has consistently recognized that the governmental interest in *efficient operation* may outweigh an individual's First Amendment rights, under certain circumstances. Those circumstances exist where the individual's political loyalty is related to effective performance of the function involved. *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkl*, 445 U.S. 507 (1980); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990). In this, if not all cases involving independent contractors performing governmental services, Petitioners' political loyalty is related to effective performance of the function involved.

Insofar as independent contractors do not have supervisors who monitor their work, they are similar to the supervisors/

decision-makers the *Rutan* Court allowed to be selected or dismissed based on political affiliation. "A government's interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views." *Rutan*, 497 U.S. at 74.

For example, in *Selch v. Letts*, 5 F.3d 1040, 1042 (7th Cir. 1993) the Seventh Circuit held that political affiliation was a proper basis for firing an Indiana State Highway Subdistrict Superintendent. The court observed:

> There is significant evidence in political life that the failure to properly provide public services, such as snow removal from highways, will adversely impact on the chief executive of a state or local government charged with providing such services. *See Tomczak*, 765 F.2d at 641 ("Indeed, one of the biggest, if not the biggest, turning points in the 1979 Chicago mayoral election involved the provision of snow removal services.").

Selch, id. at 1046.

The court also recognized that there is no need to show actual disruption or inefficiency. Once the classification is made as exempt from First Amendment protection, political firing is permissible. *Selch v. Letts*, 5 F.3d 1040, 1047.

This analysis doesn't change if the governmental service is provided by an independent contractor instead of a governmental employee. In fact, there is even more reason to allow the governmental entity latitude in discharging an independent contractor.

First, unlike an employee where direct supervision is available, the power of termination is the only sure way to exert control over an independent contractor. Any limitation on governmental ability to terminate, or not rehire, an independent contractor would effectively destroy the ability to control public services. Employees are subject to their employer's control and direction over details of their work; independent contractors are not subject to such direct supervision. *See, e.g., Vickery v. Jones*, 856 F. Supp. 1313 (S.D. Ill. 1994) (discussing practical differences between control held over temporary-employees compared to the lack of control over independent contractors).

The Seventh Circuit has consistently declined to extend *Elrod-Branti-Rutan* to independent contractors. *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984); *Triad Associates, Inc. v. Chicago Housing Authority*, 892 F.2d 583 (7th Cir. 1989), *cert. denied*, 498 U.S. 845 (1990); *Downtown Auto Parts, Inc. v. City of Milwaukee*, 938 F.2d 705 (7th Cir.), *cert. denied*, 502 U.S. 1005 (1991).

In *LaFalce*, the Seventh Circuit considered a claim by a sign company whose low bid to install and maintain benches along city streets was rejected, because it did not support the mayor. In rejecting the argument that independent contractors would be discouraged from expressing their true political views if it might cost them their job, the court stated:

> If the contractor does not get the particular government contract on which he bids, because he is on the outs with the incumbent . . . it is not the end of the world for him; *there are other government entities to bid to, and private ones as well.* It is not like loosing your job.

Id., 712 F.2d at 294 (emphasis added).

Following *LaFalce*, the Seventh Circuit in *Triad* revisited the issue of extending First Amendment protection to independent contractors. Triad Associates was a security firm hired by the Chicago Housing Authority to provide security services. Following a change in mayoral administrations, Triad alleged that the new CHA chairman began to harass, intimidate and ultimately drive out Triad, other white employees and contractors in favor of black employees and contractors who favored the new administration. The Seventh Circuit affirmed dismissal relying on *LaFalce*, as well as the Third Circuit's decision in *Horn v. Kean*, 796 F.2d 668 (3rd Cir. 1986).

In *Downtown Auto Parks*, the Seventh Circuit again considered the issue of whether to extend First Amendment protection to independent contractors. This case involved a parking garage operator whose contract was not renewed after the operator publicly challenged the City administration. The Seventh Circuit reaffirmed its decision in *LaFalce* and *Triad*. The court then cited numerous cases from other circuits and concluded that "we continue to concur in the view taken by the other circuits and hold that political favoritism in the awarding of public contracts is not actionable." *Id.; citing Sweeney v. Bond*, 669 F.2d 542 (8th Cir.), *cert. denied sub nom. Schenberg v. Bond*, 459 U.S. 878 (1982); *Horn v. Kean*, 796 F.2d 668 (3rd Cir. 1986); and *Lunblad v. Celeste*, 874 F.2d 1097 (6th Cir. 1989), *vacated*, 882 F.2d 207, *reinstated in part*, 924 F.2d 627 (1991) (*en banc*), *cert. denied*, 501 U.S. 1250 (1991).

Finally, the Seventh Circuit again affirmed the continuing validity of *LaFalce*, *Triad* and *Downtown Auto Parks* in the present case. *O'Hare Truck Service, Inc. v. City of Northlake*, 47 F.3d 883, 884-5 (7th Cir. 1994).

Similar to the Seventh Circuit analysis in *Selch v. Letts*, *supra*, the Eighth Circuit, in *Sweeney*, *supra*, held that Missouri motor vehicle fee agents were not protected from dismissal based on political affiliation. *Sweeney*, 669 F.2d at 545-6. The court noted that political party affiliation was a proper requirement for effective job performance given the nature of plaintiffs' positions which placed them in contact with the electorate, independent of the restraints of typical civil service requirements. *Id.*, 669 F.2d at 546. *See also, Fox & Company v. Schoemehl*, 671 F.2d 303 (8th Cir. 1982); *Ambrose v. Knotts*, 865 F. Supp. 342 (S.D. W. Va. 1994) (considering cases and refusing to extend free speech protection to independent contractors); *Blankman v. County of Nausau*, 819 F. Supp. 198, 205 (E.D.N.Y. 1993) (no protected free speech, association or equal protection claims where plaintiffs allege political motivation and denial of public contract), *aff'd without opinion*, 14 F.3d 592 (2d Cir. 1993).

Petitioners' citation to a Fifth Amendment case, *Lefkowitz v. Turley*, 414 U.S. 70 (1973) does not change this analysis. The fact that an independent contractor retains rights against self-incrimination under the Fifth Amendment does not affect the efficient operation of government. In contrast, an independent contractor can seriously impair the efficient operation of government simply by not fully or only lackadaisically performing the function involved. If such contractors support the political opposition, it is easy to see the disincentive for such performance of the function. Every attempt to then increase efficiency through termination would result in a federal lawsuit.

In each of the last three Seventh Circuit cases involving independent contractors' First Amendment claims, the Supreme Court has denied certiorari. *LaFalce, supra; Triad, supra; Downtown Auto Parks, supra.* Petitioners provide this Court with no "special or important reason" to reach a different result in this case.

CONCLUSION

The petition for certiorari should be denied. The petition should not be held pending the resolution of *Heiser.*

Respectfully submitted,

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APPENDIX A—JUDGMENT OF UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT DATED FEBRUARY 10, 1995

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Date: February 10, 1995

BEFORE: Honorable DONALD P. LAY, Circuit Judge*

Honorable FRANK H. EASTERBROOK, Circuit Judge

Honorable MICHAEL S. KANNE, Circuit Judge

No. 94-1222

O'HARE TRUCK SERVICE, INCORPORATED and JOHN A. GRATZIANNA,

Plaintiffs-Appellants

v.

CITY OF NORTHLAKE, an Illinois Municipal Corporation and Body Politic, REID PAXSON, Mayor and SEYMOUR SAPOZNIK, Police Chief

Defendants-Appellees

JUDGMENT — WITH ORAL ARGUMENT

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* The Honorable Donald P. Lay, of the Eighth Circuit, sitting by designation.

Appendix A

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 93 C 5860, Milton I. Shadur, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

APPENDIX B—NOTICE OF ISSUANCE OF MANDATE WITH BILL OF COSTS DATED MARCH 13, 1995

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

DATE: March 13, 1995

TO: H. Stuart Cunningham
United States District Court
Northern District of Illinois
219 S. Dearborn Street
Chicago, IL 60604

FROM: Thomas F. Strubbe, Clerk

Re: 94-1222
O'Hare Truck Service v. City Northlake
93 C 5860, Milton I. Shadur, Judge

Herewith is the mandate of this court in this appeal, along with the Bill of Costs, if any. A certified copy of the opinion/order of the court and judgment, if any, and any direction as to costs shall constitute the mandate.

• • •

[x] Original record on appeal consisting of:

ENCLOSED: TO BE RETURNED AT LATER DATED

Volumes of pleadings [1]

Appendix B

• • •

Copies of this notice sent to: Counsel of record

NOTE TO COUNSEL:

If any physical and large documentary exhibits have been filed in the above-entitled cause, they are to be withdrawn ten days from the date of this notice. Exhibits not withdrawn during this period will be disposed of.

Please acknowledge receipt of these documents on the enclosed copy of this notice.

Received above mandate and record, if any, from the Clerk, U.S. Court of Appeals for the Seventh Circuit.

Date:_____ _____
(1071-010891) Deputy Clerk, U.S. District Court

Appendix B

BILL OF COSTS

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Dated: March 13, 1995

Taxed in favor of: CITY OF NORTHLAKE, REID PAXON, mayor and SEYMOUR SAPOZNIK, police chief,

Plaintiffs-Appellants

Appeal No. 94-1222

O'HARE TRUCK SERVICE, INCORPORATED and JOHN A. GRATZIANNA,

Plaintiffs-Appellants

v.

CITY OF NORTHLAKE, an Illinois Municipal Corporation and Body Politic, REID PAXSON, Mayor and SEYMOUR SAPOZNIK, POLICE CHIEF,

Defendants-Appellees

Appendix B

Appellate Court No. 94-1222 Docketed on: 1/31/94
Short Caption: O'Hare Truck Service vs City Northlake
District Court Judge: Milton I. Shadur
District Court No.: 93 C 5860

* * *

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